Coming now to the second point on which I think it is necessary that I express an opinion if the case is to be taken further, namely, even if it had been *intra vires* does regulation 32 do more than create a rebuttable presumption? I think one is correct when one says that the statute law abounds with presumptions that on proof of certain things the party shall be deemed to have committed certain offences. Those provisions have come before the Courts in the United Kingdom and in this country on many occasions. On each and every occasion it was held that they do no more than create a rebuttable presumption. I can see no reason nor has any reason been given to me for holding that there is a distinction between regulation 32 and the other provisions which have been referred to. I am of the opinion therefore regulation 32 even if *intra vires* creates no more than a rebuttable presumption, and the arbitrator was wrong in not calling on and permitting the Government to produce evidence in rebuttal. That he did not do so is clear from the record.

This matter comes before me under the equivalent procedure of section 34 of the Courts Ordinance and the appropriate order therefore is that the order of the arbitrator is set aside and a re-trial is ordered. There will be no order as to costs.

Re-trial ordered.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

THE SINGAPORE HARBOUR BOARD v. AUSTASIA LINE LTD.

[O.C.J. (Tan Ah Tah J.) January 25, 1961]

[Singapore — Suit No. 663 of 1959]

Negligence — Ship repairers — Damage to ship — Use of fire — Fire precautions — Special dangers — Res ipsa loquitur.

Contract — Ship repairers — Claim for work done and materials provided — Claim for services rendered and fire-fighting craft and appliances provided — Fire caused by plaintiff's negligence.

In this case the plaintiffs claimed $790,533 for work done and materials provided by them at the defendants' request for the purposes of repairing the defendants' vessel *Mandama*, and $88,760.11 for services rendered and fire-fighting craft, etc. provided during a fire on the vessel. The defendants admitted these claims but alleged that a reasonable charge for the services and supply of fire-fighting craft so provided would be $8,571.40. The defendants further relied on the doctrine of *res ipsa loquitur* and alleged that the plaintiffs were negligent in carrying out the work and alternatively that the plaintiffs who were responsible for fire-fighting precautions were in breach of their duty (as a result of which the vessel caught fire). The defendants thus claimed to set off the damages suffered by them by reason of the plaintiffs' negligence against the plaintiffs' claim. Alternatively the defendants counterclaimed against the plaintiffs the damages suffered by them.

Held: (1) the plaintiffs were under a duty to take precautions against damage being caused to the ship by the fire. The plaintiffs failed to take precautions which were not only commercially practicable but were in the circumstances ordinary and usual. They thus were guilty of negligence;

(2) the doctrine of *res ipsa loquitur* applied in this case and the burden was on the plaintiffs to show either that in fact that they were not negligent or that the outbreak of the fire might more probably have happened in a manner which did not connote negligence on their part.

Cases referred to:—

(1) *Ellerman Lines Ltd.* v. *H. & C. Grayson Ltd.*, [1919] 2 K.B. 514.

(2) *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* [1920] A.C. 466.

(3) *The Pass of Ballater* [1942] 58 T.L.R. 221.

CLAIM.

C. H. Smith for the plaintiffs.

J. E. Lloyd for the defendants.

Cur. Adv. Vult.

Tan Ah Tah J.: In this case the plaintiffs' claim is for $879,293.11 being as to $790,533.00 the amount alleged to be due from the defendants to the plaintiffs for work done and materials provided by the plaintiffs at the defendants' request for the purpose of effecting repairs to the defendants' vessel *Mandama* and as to $88,760.11 being the amount alleged to be due from and payable by the defendants for services rendered and fire-fighting craft and appliances provided by the plaintiffs during a fire on the *Mandama*.

By their defence the defendants admit that the plaintiffs did work and supplied materials for and to the use of the defendants of a value of $790,533 as claimed by the plaintiffs. The defendants further admit that the plaintiffs rendered services and provided fire-fighting craft and appliances during the fire on the *Mandama* but allege that a reasonable charge for the services and supply of fire-fighting craft and appliances would be the sum of $8,571.40. It is also alleged by the defendants that the plaintiffs by their workmen who were engaged in the repair of the *Mandama* on the 28th June, 1958 were so negligent in carrying out the work that they set fire to the vessel. Further and in the alternative it is alleged by the defendants that the plaintiffs were on the 28th June, 1958 responsible for the fire-fighting precautions on the *Mandama* and were so negligent in the performance of their duties that they permitted the vessel to catch fire. In making the allegations regarding the plaintiffs' negligence in carrying out the repairs and taking fire precautions the defendants expressly state that they are relying upon the doctrine of *res ipsa loquitur*. Following on these allegations the defendants claim to set-off the damages suffered by them by reason of the plaintiffs' negligence against the plaintiffs' claim. Alternatively the defendants counterclaim against the plaintiffs for the damages suffered by them.

On the 28th June, 1958 the *Mandama* was moored near the main wharf at Keppel Harbour. The repairs which were to be carried out on the vessel involved the cutting of the plating on the steel bulkhead which separated No. 1 hold from No. 2 hold. About three feet away from the steel bulkhead and situated in No. 2 hold was

another bulkhead made of wood. This wooden bulkhead was shorter than the steel bulkhead, being bounded on either side by fore and aft bulkheads. The space of about three feet between the steel bulkhead and the wooden bulkhead, bounded on either side by the fore and aft bulkheads, will be referred to as the air space. A few feet away from the wooden bulkhead and running parallel with it was another bulkhead which will be referred to as the cooler bulkhead.

Beyond the fore and aft bulkhead on the port side there was a locker which was about 46 feet long, 13 feet wide and 10 feet high. This locker will be referred to as the port locker. Similarly, beyond the fore and aft bulkhead on the starboard side there was another locker which will be referred to as the starboard locker. Strictly speaking, the two lockers formed part of No. 2 hold but in this particular case it will, I think, make for greater clarity if they are referred to in the manner I have indicated and the term No. 2 hold is used to describe the remainder of that hold.

At the end of the port locker near the steel bulkhead was a space in which equipment was kept and maintained for the purpose of circulating cold air in the port locker. This space will be referred to as the cooler space.

The cutting of the plating on the steel bulkhead was done by the plaintiffs' employees who used oxy-acetylene equipment in the course of their work. As a precaution against fire, insulation had been removed from both sides of the fore and aft bulkheads up to a point 2½ feet above the line of the cut. The exposed surfaces were then boxed in with timber. Insulation had also been removed backwards from the floor of No. 2 hold and the port locker to a distance of 3½ feet. In addition, insulation had also been removed from the floor of the port-locker to a depth of 10 inches. The removal of the insulation was done by a different set of workmen who were not concerned with the actual cutting of the plating. After it had been removed the insulation was stacked at the after end of No. 2 hold and the after end of both lockers. All the loose timber was kept in the after end of No. 2 hold.

One of the contentions put forward by counsel for the plaintiffs was that the ship's officers were responsible for fire precautions on board the vessel. In support of this argument he referred to a note printed at the foot of the standard form of contract used by the plaintiffs when they undertake the repair of ships. In this note the attention of the customer or shipowner is drawn to Notice No. M.393 issued by the British Ministry of Transport and Civil Aviation to shipowners and other persons which is stated to reaffirm the principle that responsibility for fire prevention and fire-fighting in ships under repair is the shipowner's responsibility. On this aspect of the case it is to be observed that the repairs undertaken by the plaintiffs involved burning operations on the plating of the steel bulkhead. The law on the point is concisely stated by Atkin L.J. (as he then was) in the following passage in *Ellerman Lines, Ltd.* v. *H. & C. Grayson, Ltd.* [1] at p. 534:

> "It has to be remembered that the defendants were engaged in performing a dangerous operation, and there is no need to cite authority for the proposition that anyone using such a dangerous element as fire is under an obligation to take special care lest he injure his neighbour or his neighbour's property."

On appeal, the law as stated by Atkin L.J. was in effect affirmed by the House of Lords (see *H. & C. Grayson, Ltd.* v. *Ellerman Line, Ltd.* [2]). While it may be true that in a general way the ship's officers were responsible for taking precautions against fire, it is important to note that in the present case a specific job of work had been entrusted to the plaintiffs. They were aware of the special dangers which were involved in the work and which had to be guarded against. Having brought on board the vessel such a dangerous element as fire, the plaintiffs were under a duty to take precautions against damage being caused by it. In my judgment the burden of that duty lay upon the plaintiffs and not upon the ship's officers.

As to the standard of precautions to be taken in a case like the present, I adopt the following statement of the law by Langton J. in *The Pass of Ballater* [3] at p. 223:

> "The precautions to be considered reasonable in the circumstances vary naturally with the ratio of the danger; that is to say, precautions which might be considered reasonable where the danger was small might be plainly insufficient where the danger was increased. Thus in the present case, . . . where the act which had to be performed necessitated the bringing of fire on to the premises, the standard of reasonable precautions is of necessity exceedingly high. I would go so far as to say that in a case of the present class no precaution which was commercially practicable ought to have been omitted, and any omission of a practicable precaution would constitute a failure of duty."

The next point to be considered is whether the doctrine of *res ipsa loquitur* applies to this case. According to the evidence six of the plaintiffs' employees were engaged in the work in question on the morning of the 28th June, 1958. These were Lock Hee Chong, who was described as burner No. 1, the four burners Chung Kooi, Sreedharam, Ow Fook Choy and Chua Guan Boh and the fireman Musbah. Assisting these six employees in their work were two iron-workers named Chee Tip and Chee Sek Wai who were employees of a contractor. Work commenced at about 8.30 a.m. The last line was cut on the plating at about 10.45 a.m. Ow Fook Choy said he went into the port locker at 10.45 a.m. or 10.50 a.m. before going up on deck. The fireman Musbah did not go up on deck until 11.10 a.m. By 11.15 a.m. the fire was discovered. It is clear from the evidence and indeed it was stated by counsel for the plaintiffs in opening his case that the seat of the fire was the port locker.

During the trial it was alleged by the plaintiffs that at the time the burning operations

were proceeding the employees of another contractor were engaged in No. 2 hold clearing it of rubbish. However, when Lock Hee Chong was cross-examined on this point by counsel for the defendants he admitted that none of those employees were there. As for the fireman Musbah, at one stage of his evidence he said that these employees went up on deck before the burners started work and did not return to No. 2 hold. At a later stage of his evidence he said that he did not know whether all of them went away. Having considered the evidence on this point I find as a fact that all the employees who had been cleaning No. 2 hold left that hold before burning operations commenced.

It is clear from the foregoing that at the relevant period of time hold No. 2 and the port locker were entirely under the management and control of the plaintiffs' employees. The fire was discovered within five minutes after the departure of the fireman Musbah who was the last of the plaintiffs' employees to leave the site of the burning operations. An outbreak of fire is an event such as in the ordinary course of things does not happen if those who have the management and control of property and oxy-acetylene equipment use proper care, and it affords reasonable evidence, in the absence of explanation by the plaintiffs, that the outbreak occurred as a result of want of care. In my opinion the doctrine of *res ipsa loquitur* applies to this case.

The burden is therefore on the plaintiffs to show either that in fact they were not negligent or that the outbreak of fire might more probably have happened in a manner which did not connote negligence on their part.

According to the evidence the burners commenced burning operations near the centre of the bulkhead and worked towards the sides of the vessel. Bearing in mind that the seat of the fire was the port locker, it is important to discover the extent of the knowledge of the workmen regarding the places in the plating which had to be cut. Lock Hee Chong, who was burner No. 1 and whose duty it was to supervise the work on board the *Mandama* and other vessels, said that he did not know which particular spot in the bulkhead had to be cut. Chung Kooi said that they were to cut the plating from one fore and aft bulkhead to the other fore and aft bulkhead. Musbah said that before work commenced he was told that burning was to be done between the two fore and aft bulkheads. On this point both Chung Kooi and Musbah were misinformed as the burning operations in fact went several feet past the line of the fore and aft bulkhead on the port side. It was in fact Chung Kooi who made the last cut on the plating, as he admitted when he was recalled to the witness-box. This last cut went well beyond the line of the fore and aft bulkhead. Musbah said that he was not told about the intention to cut the plating opposite the port locker until work had been completed at the adjoining section. According to Musbah, one of the burners then came through a hole which had been made in the bulkhead, entered the port locker and told him that the next job would be in the bulkhead opposite the port locker. It is important to notice that Musbah's evidence on this point was not corroborated by any of the burners although they were all called as witnesses. On the contrary, their evidence and the evidence given by the iron-workers served to contradict what Musbah said. Ow Fook Choy said that he did not go into No. 2 hold until the burning was finished. Chua Guan Boh and Chee Sek Wai, who had been in No. 2 hold before burning commenced, both said that they did not return there. All the other employees said that they never entered No. 2 hold that morning. To my mind all this testimony leads to the conclusion that no one went to inform Musbah that the plating opposite the port locker was to be cut. In my view Musbah was being deliberately untruthful when he said that one of the burners entered the port locker and gave him that information. The significance of this finding will appear hereafter.

One of the precautions taken by Musbah before work commenced was to sprinkle water in the air space. This he did out of a drum of water which was carried into No. 2 hold. In addition he had a foam extinguisher which was also taken into No. 2 hold. It is significant that Musbah never said that he sprinkled water in the port locker before the plating opposite it was cut, although that was an elementary precaution which a fireman placed in his position should have taken. I find that this precaution was not taken by him.

Before work commenced at the centre of the bulkhead four metal screens were placed in the air space in order to prevent sparks and molten metal from flying and causing damage. Without such screens sparks and molten metal would normally be thrown to a distance of six to eight feet. Musbah said that when he was informed that burning would take place opposite the port locker he took the largest of the metal screens and the drum of water into the port locker. He added that Ow Fook Choy and Chee Sek Wai assisted him to do this. This was denied by Ow Fook Choy who said that he did not assist anyone to carry a metal screen from the air space to the port locker. He further stated that he did not see the drum of water in the port locker but saw it just inside the door of the cooler bulkhead. It will be remembered that he said that he did not go into No. 2 hold until the burning was finished. As for Chee Sek Wai, he said that after helping Musbah to put up a metal screen in the air space he went over to No. 1 hold and did not go back to No. 2 hold. Musbah said that he himself put up the metal screen, which he said had been carried into the port locker, under the cooler space, opposite the area where burning was to take place into the port locker. After careful consideration of all the

evidence on this point I have come to the conclusion that Musbah did not take a metal screen into the port locker and that no metal screen was put up to prevent sparks and molten metal from being thrown into the port locker. In arriving at this conclusion I have rejected the evidence of Ow Fook Choy, who, on being recalled to the witness box on the day following the cross-examination of Musbah on this point, stated for the first time that he saw a metal screen in the port locker. In my opinion Musbah failed to put up the metal screen because he was not aware of the fact that burning was to take place into the port locker and no one had drawn his attention to that fact. In view of the fact that sparks and molten metal were normally thrown to a distance of six to eight feet it was a precaution which should have been taken, and failure to do so is, in my view, clearly evidence of negligence. The danger of fire to parts of the port locker and the timber used to box in the exposed portion of the fore and aft bulkhead should have been apparent to the plaintiffs' employees. The inspection made by Ow Fook Choy after the burning operations were over must have been of a cursory nature. This is borne out by the fact that about twenty minutes after his inspection fire broke out in the vicinity of the place inspected by him. In my opinion all the evidence points to the fact that the fire started towards the forward part of the port locker and spread to the after part of the port locker and No. 2 hold. Those witnesses who saw flames at the after end of the vessel came on the scene nearly two hours after the fire started. In my view the precautions taken by the plaintiffs to guard against fire were inadequate and the inspection carried out after the burning operations were completed was done in a careless manner. It follows, therefore, in my judgment, that the plaintiffs have failed to discharge the burden which lies on them of showing that they were not negligent.

There were a number of other matters regarding which Musbah gave evidence which was contradicted by other witnesses who were called on behalf of the plaintiffs. I do not consider it necessary to deal with this evidence in detail. As a witness, Musbah was in my opinion both unsatisfactory and unreliable.

I turn now to consider various theories which were put forward by counsel for the plaintiffs to account for the outbreak of fire on the vessel. The first theory was that it could have been caused by the workmen who were engaged in clearing away rubbish from No. 2 hold throwing away a lighted cigarette end or half-burnt match which would start insulation material smouldering. As to this theory it is to be observed, first, that these workmen had, as I have said, left No. 2 hold before burning operations commenced and, secondly, that there is no evidence that anyone on board the vessel was smoking or threw away a cigarette end or match. The second theory was described as an electrical fault in removing composition and the third theory as high resistance earth during the course of welding. It is sufficient to say that no evidence was given in support of either of these theories. The fourth and last theory was that there was a possibility of spontaneous combustion in the insulation material which had been removed and put into bags. This last theory was not pursued by counsel for the plaintiffs. As no other explanation has been put forward on behalf of the plaintiffs it follows that they have failed to show that the outbreak of fire might more probably have happened in a manner which did not connote negligence on their part.

It is clear that in carrying out the work which was entrusted to them and which involved the bringing of fire on the vessel, the plaintiffs failed to take precautions which were not only commercially practicable but were, in the circumstances, ordinary and usual. In my judgment, in failing to take such precautions, the plaintiffs were guilty of negligence.

Counsel for the plaintiffs has conceded that if the plaintiffs are found guilty of negligence the plaintiffs' claim must fail. On the other hand the defendants have succeeded on their counterclaim and are entitled to recover damages from the plaintiffs. There will therefore be judgment for the defendants with costs on the claim as well as on the counterclaim. The damages payable by the plaintiffs to the defendants will be assessed by the Registrar.

Judgment for the defendants.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier.*

HOCK HIN & CO. v. ALLWIE & CO. LTD.

[O.C.J. (Buttrose J.) February 10, 1961]

[Singapore — Suit No. 898 of 1961]

Contract — Price of goods sold and delivered — No agreed price — Whether s.8(2) of Sale of Goods Act, 1893 applied.

This was an action for the price of goods sold and delivered by the plaintiffs to the defendants at the defendants' request. The claim was for $9,273.53 but the defendants admitted liability of $4,847.35 for which the plaintiffs signed judgment and obtained payment after levying execution. The defendants denied liability of the remaining amount and stated in the pleadings that no prices were agreed but it was an implied term of the verbal contract that the goods were to be at reasonable prices or alternatively at fair market value and a quantity of them were not. At the trial the defendants stated that it was an express term of the contract that the plaintiffs would supply the goods at fair market prices and that the plaintiffs had agreed to give the defendants a credit note for the amount alleged to be overpaid. It was also argued by the defendants that as no price was fixed they were only liable to pay a reasonable price by virtue of section 8(2) of the Sale of Goods Act, 1893.

Held: (1) it is not open to the defendants on the pleadings as they stand to raise these defences;

(2) it was not an express term of the contract that the goods should be supplied at fair market prices or that the plaintiffs had agreed to give a credit note;